Supreme Court, U. S.
FILED
MAR 13 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1977

No. 77-1257

WALTER D. SCHMIER,
Appellant,

vs.

Trustees of the CALIFORNIA STATE UNIVERSITY AND COLLEGES, et al.,
Appellees.

JURISDICTIONAL STATEMENT

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Appellees.

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Superior Court of San Diego County, California, has not been reported.

The opinion of the Court of Appeal of the State of California, Fourth District, Division One, is reported at 74 Cal.App.3d 714, 141 Cal. Rptr. 472. Copies of those decisions are annexed hereto as appendices A and B respectively, at pp. 15 and 19, respectively.

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The nature of the proceeding. Appellant, formerly Associate Professor of Business Law at San Diego State University, was involuntarily and mandatorily retired at age 67 pursuant to California Education Code §24207 and Government Code §20981 and thereafter brought an action to compel his reinstatement to the tenured faculty position he had previously enjoyed for seven years. This is an appeal from the decision of the Court of Appeal, Fourth District, Division One, of the State of California, affirming the dismissal of the case by the Superior Court following the allowance by that court of appellees' demurrers without leave to amend.

2. The judgment or decree sought to be reviewed was dated and entered on October 18, 1977, and is embodied in the opinion of the Court of Appeal, Fourth Appellate District, Division One, State of California, 4 Civil No. 16304, 74 Cal.App. 714. An order denying hearing in the Supreme Court of California was entered on December 15, 1977. The notice of appeal to this Court was filed in the above Court of Appeal on February 27, 1978.

3. The statutory provision believed to confer on this Court jurisdiction of the appeal is 28 U.S.C. Sec. 1257(2).

4. Cases believed to sustain the jurisdiction: *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307

(1977), *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974), *Traux* v. *Raich*, 239 U.S. 33 (1915), *Smith* v. *Texas*, 233 U.S. 630 (1914) and *Gault* v. *Garrison*, USCA No. 74-1579 7th Cir. 16 FEP cases 245 (1977).

State Statutes whose validity are involved.

California Education Code:

§24207. Termination of employment

The employment of any employee of the trustees, excepting those employees who on October 1, 1949, and on September 7, 1955, were members of the State Teachers' Retirement System, shall terminate on the first day of the calendar month next succeding that in which he attains mandatory retirement age, except as provided in this section.

An academic or administrative employee may elect to continue in active service until the end of the college term or academic year during which he attains mandatory retirement age. An academic employee who reaches the mandatory retirement age, if mentally and physically sound, may be employed from year to year without tenure, for the good of the service, at the discretion of the trustees. The payment of retirement allowances by either the State Teachers' Retirement System or the Public Employees' Retirment System, or both of said systems, to such a person employed from year to year shall

be suspended during the period of such employment and such suspension shall not serve to reinstate such a person to membership in either of said systems. If a person should die during such a period of suspension, said systems shall pay any death benefits that would have been payable had the death not occurred during such a period. A period of suspension shall end on the last day of the month during which such employment or re-employment is terminated. Said systems shall then resume the payment of the retirement allowance to such a person without change from what it was at the beginning of the latest period of suspension except for any change in the provisions governing the calculation of the allowance which was made during said period and made applicable to the persons then retired.

Any person over the mandatory retirement age who otherwise has the qualifications of an academic or administrative employee and who is not retired under the State Teachers' Retirement System or the Public Employees' Retirement System, if mentally and physically sound, may be employed from year to year without tenure at the discretion of the trustees. Such employment shall not enable him to become a member of nor serve to reinstate him as a member of either of said systems.

As used in this section, "mandatory retirement age" means the mandatory retirement age as provided in Government Code Section 20981.

Annotated Codes, 1977 Supp.

California Government Code:

§20981. State miscellaneous member, school member, and local miscellaneous member

Every state miscellaneous member, school member and local miscellaneous member shall be retired on the first day of the calendar month succeeding that in which he attains age 70 if his 70th birthday occurs on or prior to September 30, 1971. Such members who have attained age 69 but not age 70 on September 30, 1971, shall be retired October 1, 1971, and those who attain age 69 in the period October 1, 1971, to September 30, 1972, inclusive, shall be retired on the first day of the calendar month next succeeding that in which they attain age 69. Such members who have attained age 68 but not age 69 on September 30, 1972, shall be retired on October 1, 1972, and those who attain age 68 in the period October 1, 1972, to September 30, 1973, inclusive, shall be retired on the first day of the calendar month next succeeding that in which they attain age 68. Such members who have attained age 67 but not age 68 on September 30, 1973, shall be retired on October 1, 1973, and those who attain age 67 on or after October 1, 1973, shall be retired on the first day of the calendar month next succeeding that in which they attain age 67; provided that:

(a) Any member who is employed in a teaching capacity on a semester or school-year basis may elect to continue in active service until the end of the semester or school year which he attains compulsory retirement age.

(b) Any member who is a state college president may elect to continue in active service until the end of the quarter, semester, or academic year during which he attains compulsory retirement age.

(c) Any member who is an academic teaching and administrative employee, as defined in this section, may elect to continue in active service until the end of the quarter, semester, or academic year during which he attains compulsory retirement age. Academic teaching and administrative employee means a state college employee of the rank of professor or lower, departments heads and division heads whose principal duty is connected with the administration of the teaching program or related service, and includes, but is not limited to deans, business managers, admission officer, registrar, placement officer and professional librarians.

West's Annotated Codes, 1977 Supp.

QUESTION PRESENTED

Whether California Education Code §24207 and California Government Code §20981, which together create an age based mandatory retirement program causing dismissal from tenured employment of State

College faculty at age 67, are repugnant to either the due process or equal protection clauses of the Fourteenth Amendment rendering appellant's discharge from employment at respondents' university unlawful.

STATEMENT OF THE CASE

Appellant filed a petition for writ of mandamus to compel his reinstatement and complaint for damages against the trustees of the California State Universities and Colleges, and others, following his involuntary retirement from employment as a tenured associate professor of business law at San Diego State University. Appellant was retired solely because he had reached age 67. The petition and complaint alleged, inter alia, that the discharge of appellant from state employment denied him the due process and equal protection guarantees of the Fourteenth Amendment to the Constitution.

Respondents' demurrers were sustained by the Superior Court without leave to amend. No evidence was taken by the court and the parties deem the record not significant to this appeal.

On appeal the decision of the Superior Court was affirmed, 74 Cal.App. 714.

Appellants' petition for hearing in the Supreme Court of California was denied with Mosk, J. and

Newman, J. of the opinion that the petition should have been granted.

SUBSTANTIALITY OF THE FEDERAL QUESTION

This case presents to the Court the due process and equal protection issues raised by statutory age based mandatory retirement plans affecting public employees engaged in occupations in which the safety of others is not critically dependent upon their performance at any particular instant. The Court addressed this issue's complement in *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, but the appellate courts have been unable to follow the decision with consistent results.

Contrast *Gault* v. *Garrison*, USCA No. 74-1579 7th Cir., 16 FEP cases 245 (1977) with *Johnson* v. *Lefkowwitz*, USCA No. 77-7282, 2nd Cir., 16 FEP cases 239 (1977).

In *Johnson* the Court rejected the due process and equal protection arguments citing *Massachusetts Bd. of Retirement* v. *Murgia*, supra, and other cases, 16 FEP cases at 241, and affirmed the dismissal of a complaint involving the mandatory retirement of a New York public employee at age 70.

But in *Gault* v. *Garrison*, supra, the court noted a lack of evidence supporting any purpose for the age based mandatory retirement scheme of the school district there involved and reversed the order dismissing the complaint employing *Murgia* as authority.

The court accepted *Murgia* as establishing the rational basis test as an appropriate standard to review the questioned retirement plan, 16 FEP 245, 247, and went on to hold the scheme unconstitutional nonetheless.

The court said, "It is no answer to say that a state does not violate the Equal Protection clause merely because the classifications, made by its law are imperfect. *Dandridge* v. *Williams*, 397 U.S. 471, 478 (1970), when these classifications cannot be shown to be even rationally related to the objective the state is attempting to achieve" . . . "unlike the court in *Murgia*, we cannot say that the provisions in the instant case would eliminate any more unfit teachers (assuming that such is the purpose) than a provision to fire all teachers whose hair turns grey." . . . "We cannot uphold as constitutionally valid a classification of public school teachers based upon age without a showing that it rationally furthers some identifiable and articulable state purpose." 16 FEP cases 248.

This language could literally be transposed to the case at bar and require its reversal.

The case now brought to the Court presents the situation where the State of California by its legislature has refuted the economic legislative purpose imputed to it by the appellate court in *Townsend* v. *City of Los Angeles*, 49 Cal.App.3d 263 (1975) and tacitly approved by the appellate court herein.

In the Statutes of 1977, Chapter 851, California enacted into law, as a part of legislation banning age based mandatory retirement the following finding:

> "The Legislature of the State of California finds and declares that the use of chronological age as an indicator of ability to perform on the job and the practice of mandatory retirement from employment are obsolete and cruel practices. The downward trend toward involuntary retirement at ages from 55 years represents a highly undesirable development in the utilization of California's worker resources. In addition, this practice is now imposing serious stresses on our economy and in particular on pension systems and other income maintenance systems."

California courts have held since *Ex Parte Fedderwitz* 6 C.U. 562, 62 P. 935, at 936 (1900) that in a variety of circumstances a "fact was legally established in the most solemn and conclusive manner by the preamble to the joint resolution of the legislature." *Taylor, et al.*, v. *Cole, et al.*, 201 Cal. 1327 (1923). Thus, the California legislature has concluded that age based mandatory retirement does not serve the public interest as a matter of fact.

Certainly the fact that the legislature found age based mandatory retirement to be "obsolete and cruel" is enough to indicate the probability that facts existed at the time of appellant's discharge which were plead or could be plead, and which on trial would show

that mandatory retirement did not meet constitutional standards. Thus, the demurrer to these causes of action should not have been upheld.

Otherwise the California Court of Appeal may impute to the legislature unrealistic and legislatively rejected purposes. If judicial imagination may be so far strained as to create legislative purposes rejected by the legislature itself, then truly the rational basis test has no meaning. We believe that the rational basis test only has meaning if the state must demonstrate at least some rational relationship to a realistic, identifiable and articulable state purpose to sustain the validity of discriminatory legislation.

Given such a test, we believe age based mandatory retirment must fail because no logical nexus has been or can be stated between age based mandatory retirement of school teachers, and permissable government interests.

Further, we do not believe this Court can sustain the use of arbitrary classifications based on age alone to deprive older workers of the equal opportunity to compete for, and retain, employment since old age certainly does not remove older persons from the burden of life's economic reality. The Court's protection of equal access to employment has been far too important to it and to the American people to allow such a result. *Smith* v. *Texas*, 237 U.S. 630 (1914); *Truax* v. *Raich*, 239 U.S. 33 at 41 (1915); *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1914).

Will the Court say that pregnant school teachers, whose condition is both avoidable and temporary should enjoy constitutional protections in tenured employment while older employees whose condition is unavoidable and permanent do not?

We believe all persons should hold employment according to one standard: individual merit and we urge the Court to so rule.

The question presented by this appeal is the subject of much expensive litigation in courts throughout the nation. Most of this litigation would be rendered unnecessary if the court would directly address the issues offered by this case and rule on the constitutionality of age-based mandatory retirement policies affecting public employees in occupations in which the safety of others is not critically dependent upon their performance at any particular instant.

Accordingly we pray the Court to hear and determine our appeal.

Respectfully submitted,

Dated: March 9, 1978.

KENNETH JAY SCHMIER
Attorney for Appellant

STATE OF CALIFORNIA }
COUNTY OF ALAMEDA } ss.

AFFIDAVIT OF SERVICE BY MAIL

Kenneth J. Schmier being sworn, says that he is a citizen of the United States, over 18 years of age, a resident of San Diego and not a party to the within action.

That affiant's' business address is

9911 West Pico, Suite 1150
Los Angeles, California 90035

That affiant served 3 copies of the attached Jurisdictional Statement by placing said copies in an envelope addressed to

Evelle Younger
Attorney General
William R. Winship, Jr.
Deputy Attorney General
110 West "A" Street
San Diego, California 92101

which envelope was then sealed and postage fully prepaid thereon, and thereafter was on March 10, 1978, deposited in the United States mail at Oakland, California. That there is delivery service by the United States mail at the place so addressed, or regular com-

munication by United States mail between the place of mailing and the place so addressed.

Thus all parties required to be served have been served.

I declare under penalty of perjury
that the foregoing is true and correct.

Executed on March 10, 1978,
at Oakland, California.

KENNETH J. SCHMIER

APPENDIX

APPENDIX A

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SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

Filed October 18, 1976, Robert D. Zumwalt, Clerk

WALTER D. SCHMIER,
Petitioner and Plaintiff,

v.

TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY AND COLLEGES, GLEN S. DUMKE, Chancellor, California State University and Colleges; BRAGE GOLDING, President, San Diego State University; GEORGE C. GROSS, Dean of Academic Administration, San Diego State University; ROBERT HUNGATE, Dean, School of Business Administration, San Diego State University; PIETER A. VANDENBERG, Chairman, Department of Finance, San Diego State University,
Respondents and Defendants.

No. 373864

ORDER SUSTAINING DEMURRERS WITHOUT LEAVE TO AMEND AND JUDGMENT OF DISMISSAL

The first demurrer filed on behalf of respondents and defendants, Trustees of California State University and Colleges, et al., was heard on December 19, 1975 in Department 11 of the above-entitled court; the Honorable Jack R. Levitt, Judge Presiding; petitioner and plaintiff was represented by Kenneth J. Schmier, Esq. and Eric S. Schmier, Esq.; respondents and defendants were represented by Evelle J. Younger, Attorney General, by William R. Winship, Jr., Deputy Attorney General.

The second demurrer filed on behalf of respondents and defendants, Trustees of California State University and Colleges, et al., was heard on October 8, 1976 in Department 26 of the above-entitled court, the Honorable Daniel C. Leedy, Judge Presiding; petitioner and plaintiff was represented by Kenneth J. Schmier, Esq., respondents and defendants were represented by Evelle J. Younger, Attorney General by William R. Winship, Jr., Deputy Attorney General.

IT IS HEREBY ORDERED THAT:

The demurrers to the petition for writ of mandamus and complaint are sustained without leave to amend in that no causes of action have been stated under the authority of *Townsend* v. *County of Los Angeles*, 49 Cal. App. 3d 263 (1975).

Dated: October 18, 1976.

DANIEL C. LEEDY
Judge of the Superior Court

APPROVED AS TO FORM:

KENNETH J. SCHMIER, ESQ.
Attorney for Petitioner and Plaintiff

The Clerk is instructed to enter this judgment of dismissal.

DANIEL C. LEEDY
Judge of the Superior Court

APPENDIX B

IN THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

Filed October 18, 1977, Ervin J. Tuszynski, Clerk

WALTER D. SCHMIER, *Petitioner and Appellant,* v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, et al., *Respondents.*	**4 Civ. No. 16304** **(Superior Court No. 373864)**

APPEAL from a judgment of the Superior Court of San Diego County. Daniel C. Leedy, Judge. Affirmed.

THE COURT*

Walter D. Schmier appeals the dismissal of his petition for writ of mandate entered after a general demurrer to it had been sustained without leave to amend. At issue is whether the Trustees of the California State University may be compelled to retain Schmier on active employment beyond the mandatory retirement age of 67 (Gov. Code §20981; Ed. Code §24207).

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*Before Brown, P.J., Cologne, J. and Rosado, J.**
**San Diego County Superior Court Judge sitting under assignment by the Chairperson of the Judicial Council.

In 1967 Schmier was hired as an assistant professor by the President of San Diego State College (now San Diego State University). At that time the mandatory retirement age for public employees was 70. Schmier successfully achieved tenure.

Effective June 21, 1971 Government Code section 20981 was amended to lower the mandatory retirement age for public employees to 67. A state college employee of the rank of professor or lower could elect to complete the quarter, semester or academic year during which he attained compulsory retirement age.

Schmier contends the college president had authority to contract on behalf of the State College Trustees (Ed. Code §§23608 & 23605). Since the "contract" was with reference to the acquisition of tenure and a compulsory retirement age of 70 (at the time of the contract), Schmier contends he has a contractual right to employment to age 70 and his termination at age 67 was a breach of his contract.

Miller v. *State of California*, 18 Cal. 3d 808, 813, holds against Schmier's contention and unless it can be distinguished, is controlling. *Miller* holds public employment is not held by contract but by statute:

> "[N]o employee has a vested contractual right to continue in employment beyond the time or contrary to the terms and conditions fixed by law." (*Miller* v. *State of California, supra*, 18 Cal. 3d 808, 813.)

Miller further held:

> "In view of these long and well settled principles, we conclude that the power of the Legislature to reduce the tenure of plaintiff's civil service position and thereby to shorten his state service, by changing the mandatory retirement age was not and could not be limited by any contractual obligation." (*Miller* v. *State of California*, 18 Cal. 3d 808, 814.)

This last cited holding of *Miller* disposes of Schmier's contention the Trusteees are bound to continue him in active employment under the doctrine of promissory estoppel.

Schmier attempts to distinguish *Miller* on the basis that Education Code section 24207 vests discretion in the Trustees to continue an employee beyond compulsory retirement age "for the good of the service." Contrary to Schmier's contention, that provision does not convert his employment to a contractual relationship by granting power to comply with an "agreement" to employ to age 70. The discretion to extend employment beyond mandatory retirement age is itself a statutory right which must be exercised as provided by the statute and granted to those who are mentally and physically sound, on a year to year, non-tenure basis, for the good of the service and at the discretion of the Trustees.

We conclude Schmier's employment was governed by statute rather than contract, as set forth in *Miller*,

and no liability may be imposed by reason of his termination at the mandatory retirement age.

Schmier attacks statutory establishment of mandatory retirement based on age as being unconstitutional. If *Townsend* v. *County of Los Angeles*, 49 Cal. App. 3d 263 is still good law as applied to the statutes as they read when Schmier was retired, his arguments must be rejected. That case dealt with and ruled against Schmier's contentions which are asserted in this case.

What complicates an otherwise routine disposition of this issue is the enactment of Assembly Bill No. 568 (Stats. 1977, ch. 851) as an urgency statute, to take effect immediately. A.B. 568 generally does away with age mandated compulsory retirement where the employee wishes to continue work and the employer certifies the worker as being competent. Section one of the bill provides:

> "The Legislature of the State of California finds and declares that the use of chronological age as an indicator of ability to perform on the job and the practice of mandatory retirement from employment are obsolete and cruel practices. The downward trend toward involuntary retirement at ages from 55 years represents a highly undersirable development in the utilization of California's worker resources. In addition, this practice is now imposing serious stresses on our economy and in particular on pension systems and other income maintenance systems."

Schmier argues the uncodified statement of reasons set forth above does away with the foundation of the *Townsend* case by restating public policy. He argues the Legislature has effectively overruled *Townsend.* Aside from the separation of powers issues raised by Schmier's contention, we are satisfied constitutionality of legislation should not be determined by amorphous concepts of public policy. Public policy correctly is used as an aid in construing the meaning of legislation and in enacting new legislation. It would only be appropriate to test the constitutionality of legislation by construing public policy in those instances where the policy in question is constitutionally mandated.

Moreover, the Legislature recognized the constitutionality of mandatory retirement based on age when it excepted from the operation of A.B. 568 patrol or state safety members (Gov. Code §20983.5), local safety members and employees of contracting agencies (Gov. Code §20983.6).

Finally, Schmier contended at oral argument A.B. 568 should be given retrospective effect. We find nothing expressed in the statute to negative the presumption the legislation is to be applied prospectively only (*Canfield* v. *Prod*, 67 Cal. App. 3d 722, 729).

Judgment affirmed.

APPENDIX C

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IN THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION ONE

Filed February 27, 1978, Ervin J. Tuszynski, Clerk

WALTER D. SCHMIER, *Plaintiff and Appellant,* vs. TRUSTEES OF CALIFORNIA STATE UNIVERSITY AND COLLEGES, et al., *Defendants and Respondents.*	No. 16304

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE
UNITED STATES

NOTICE IS HEREBY GIVEN that WALTER D. SCHMIER, the plaintiff and appellant herein, hereby appeals to the Supreme Court of the United States from the final judgment of this Court entered on

October 18, 1977, a hearing on which was denied by the California Supreme Court on December 15, 1977.

This appeal is taken pursuant to §1257(2) of Title 28 of the United States Code.

Dated: February 22, 1978.

KENNETH J. SCHMIER
Attorney for Plaintiff and Appellant